IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CWP No. 306 of 2007

Reserved on : 6th August, 2007

Date of Decision: 7th September, 2007.

M/s A.J.Infrastructures Petitioner

Versus

State of H.P. and others Respondents

Coram

The Hon'ble Mr. Justice V.K.Gupta, C.J.

The Hon'ble Mr. Justice Sanjay Karol,J.

Whether approved for reporting[1]? Yes.

For the petitioner: Mr.Deepak Kaushal, Advocate.

For the respondents: Mr.M.S.Chandel, Advocate General, with Mr.J.K.Verma, Dy. Advocate General for respondents No.1 to 5.

Mr.G.C.Gupta, Senior Advocate, with Mr. Mohinder Gautam, Advocate, for respondent No.6.

Sanjay Karol, J.

Petitioners are auction purchasers and have assailed the order dated 22.12.2006 whereby their application for getting the auctioned property mutated in their name in the revenue record has been rejected and an entry of demand of arrears of sales tax dues of erstwhile owners has been entered into the revenue record.

Petitioner is a private limited company. Respondent No.1 is the State of Himachal Pradesh, respondent No.2 is Deputy Commissioner, Sirmaur District at Nahan, respondent No.3 is Tehsildar,

[1] Whether the reporters of Local Papers are allowed to see the Judgment?

Nahan, respondent No.4 is Secretary (Excise and Taxation), Govt. of H.P., respondent No.5 is Excise and Taxation Officer, Nahan and respondent No.6 is State Bank of Patiala (hereinafter referred to as the Bank).

Brief facts necessary for adjudicating the controversy in the present writ petition are as under:-

For various loans/advances received from respondent No.6-Bank, M/s Eastman Rubber and M/s Eastman Tread (hereinafter referred to as borrower) mortgaged their property comprising Khasra No. 254/2/1, Khatauni No. 7 min, 13 min, measuring 3 bighas 7 biswas, situated at Mauza Moginand, Tehsil Nahan, District Sirmaur, HP. (hereinafter referred to as the property). Due to various defaults on account of repayments the Bank classified their account as Non-Performing Asset (NPA) in its books and in terms of Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Interest Act, 2002 (hereinafter referred to as the Act) served a notice asking the borrower to make good the payment and regularize the account. Further, another notice under Section 13(4) of the Act, intending to take over the property, was issued to the borrower and the possession of the assets i.e. the property was in fact taken over on 7.10.2004. In exercise of its rights and powers under the Act, the Bank put the property to auction vide public notice dated 17.12.2004 and in an open auction held on 18.1.2005, petitioner being the highest bidder for a sum of Rs.50,01,000-00 was declared as a successful auction purchaser on which date itself part payment was made and the bid was accepted. The entire bid amount was also paid within the stipulated period of time. In accordance with the provisions of Rule 9(6) and (10) of the Security Interest (Enforcement)

Rules, 2002 (hereinafter referred to Rules), sale certificate was issued on 21.7.2005 to the following effect:-

> "receipt of the sale price in full and handed over the delivery and possession of the scheduled property. The sale of the scheduled property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned."
>
> (Emphasis supplied)

On 24.2.2006 itself the Bank informed all the concerned authorities including the Superintending Engineer, HPSEB, District Sirmaur at Nahan; Labour Inspector, District Sirmaur at Nahan; office of the respondent No.4; AETC and Excise and Taxation Department, Nahan, Sales Tax Officer, District Sirmaur at Nahan; the Deputy Commissioner, District Sirmaur at Nahan, the Assistant Collector (Tehsildar)-respondent No.3, Land Revenue Department, District Sirmaur at Nahan, about the sale of the property to the petitioner to the following effect:-

> "In accordance with the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (Second) Ordinance, 2002 (No. sic) and in the exercise of powers conferred under section 13 read with Rule 9 of the Security Interest (Enforcement) Rules of the abovementioned property was subsequently sold by Bank through tendering process to M/s A.J. Infrastructure Pvt. Ltd. on receipt Bank and final payment from them vide Sale Certificate ARB/879 dated July 21, 2005. The property mentioned above was sold free from all the encumbrances."
>
> (Emphasis supplied)

Vide letter dated 7.3.2006, petitioner also requested the respondent No.3, to transfer the property in its name to enable them to establish their industrial unit.

That due to the statutory bar, in spite of the sale certificate the sale deed could not be executed and registered, therefore, in accordance with provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 (hereinafter referred to Tenancy Act), petitioner sought permission from respondent No.1 to effect the transfer of the property in its name by getting the sale deed executed. The State of H.P., after collecting information required from the District Collector and various departments and fully satisfying itself with regard to petitioner's requirement of the property, accorded permission vide order dated 17.8.2006 and consequently petitioner was able to get the sale deed executed and registered on 6.9.2006, inter alia, containing the following clause:-

> "And it is thereby further declared that the said land building and machinery etc. is free from all encumbrances, charge and demands."
>
> "And that he, the seller or any other person have not done anything whereby the said property may be subject to any attachment of liens of any person, court or banks etc."

Thereafter on 7.9.2006, the Bank again informed respondent No.3 of the auction sale and on petitioner's another application for getting the property mutated in its name, an order of rejection was passed on 22.12.2006 for the reason that on the asking of respondent No.5, respondent No.3 had made entries (red entry) pertaining to demand of arrears of tax payable by M/s Regent Rubber and M/s Eastman Tread under the provisions of H.P. General Sales Tax Act, 1968 (hereinafter referred to as the Tax Act)

On inquiry the petitioner discovered that on 11.10.1999 one M/s Regent Rubber Pvt. Ltd. had mortgaged the property with H.P. Financial Corporation and due to breach of terms of their agreement, the

property was taken over by the Corporation and sold by way of open auction on 8.6.2001 to M/s Eastman Rubber, the borrower of respondent No.6- Bank. At that time, there was no entry in the revenue record pertaining to any statutory demand of dues payable by M/s Regent Rubber Pvt. Ltd. In continuation of his earlier letters dated 8.7.2004 and 18.5.2006 (both not on record), vide letter dated 8.8.2006 respondent No.5 had asked respondent No.3 to make entries in the revenue record for the amounts due towards the sales tax/central tax liabilities of M/s Regent Rubber, Moginand and Eastman Rubber, Moginand, amounting to Rs.19,03,845/- and Rs.13,73,115/-, respectively, which was got done. Thus in this back ground, the request of the petitioner to mutate the property in its name was rejected.

In the return filed by respondents No.1 to 3 the aforesaid factual position is admitted, however, it is clarified that no action as requested by respondent No.5 in terms of its letters dated 8.7.2004 and 18.5.2006 was taken and, therefore, disciplinary action against the erring officials has been initiated against the erring officials. Importantly, it is admitted that registration of the sale deed was executed and registered in due compliance of the codal formalities. The impugned action is justified as a legitimate exercise of their powers under the provisions of 35(5) of the H.P. Land Revenue Act. (hereinafter referred to Revenue Act).

According to respondents No.4 and 5, the borrower company is a registered assessee under the provisions of Tax Act. Assessment proceedings, after issuance of notice dated 24.12.2004, were finalized when ex parte assessment order dated 18.1.2005 was passed in relation to the Assessment Years 1998-99, 1999-2000, 2000-2001 and 2001-02. Reliance has been placed on the provision of Section 16-B of

the Tax Act to contend that the liability of the State, being a Crown Debt, has 1st charge on the property.

In its return filed by respondent No.6, the Bank has taken the stand that it was a mortgaged and secured creditor qua the property of borrower and the said borrower was classified as NPA in the books of the accounts of the Bank. The revenue record of rights relating to the property were not only silent but clearly established the unencumbered status of the property and the respondent-Bank accordingly accepted the property as security for securing the loans. It has been stated that respondents No.4 and 5 are acting arbitrarily, highhandedly and contrary to law in staking their claim to the property. The action of the said respondents is an act of colourable exercise of their official authority to deplete and curtail the exclusive first charge of the respondent-Bank over the property.

Learned counsel for the petitioner has referred to the decisions in *Solidaire India Ltd. vs. Fairgrowth Financial Services Ltd.,* reported in (2001) 3 SCC 71, *Collector of Aurangabad and another vs. Central Bank of India and another,* reported in AIR 1967 SC 1831, *UTI Bank Ltd. vs. The Deputy Commissioner of Central Excise, Chennai and another,* reported in AIR 2007 Mad. 118.

Learned counsel for the Bank has relied upon *Allahabad Bank v. Canara Bank and another*, 2000(4) SCC 456.

Learned Advocate General has relied upon the decisions in *State Bank of Bikaner & Jaipur vs. National Iron & Steel Rolling corporation and others,* reported in 1995(2) SCC 19, *Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co.,* reported in (2000) 5 SCC 694, *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. and others*, reported in (2001) 3 SCC 71. He has referred to Section 16-B of the Tax

Act to contend that the State has a first charge on the property of the dealer and, therefore, the action of the respondent-State is totally justifiable in law.

The point in controversy in the present writ petition is as to whether provisions of the Act would override the inconsistent provisions of the Tax Act and the Revenue Act and further as to whether in view of the provisions of Section 16-B of the Tax Act, the respondent-State would have first charge over and above the secured creditor whose right is protected under the Act.

The Tax Act is a taxing statute enacted by the State of H.P. pursuant to its legislative powers under 7th Schedule, List II, (Item No.52) and the Act, a subsequent special legislation, has been enacted by the Central Government in exercise of its legislative powers under 7th Schedule, List-I, Items 45 and 92 of the Constitution of India.

The relevant provisions of the relevant Acts necessary for the purpose of adjudicating the controversy are reproduced as under:-

Securitization and Reconstruction of Financial Assets and Enforcement of Interest Act, 2002

The object of the Act is to enable the Banks and Financial Institutions to expeditiously recover the dues lying locked in unproductive assets the value of which was deteriorating with the passage of time. The Legislature, therefore, enacted the new Act providing for taking over the assets of the non-performing units.

> “2(1)(zd) :"Secured Creditor" means "any bank or financial institution or any consortium or group of banks or financial institutions and includes -
>
> (i) debenture trustee appointed by any bank or financial institution; or
> (ii) securitization company or reconstruction company; or

(iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;"

“2(1)(ze): "Secured Debt" means a debt which is secured by any security interest."

“13. Enforcement of security interest.- (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) ……

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset; …..

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto,

shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."

"35. The provisions of this Act to override other laws.- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any other instrument having effect by virtue of any such law."

(Emphasis supplied)

H.P. General Sales Tax Act

"14. (1) If the Assessing Authority is satisfied without requiring the presence of dealer or the production by him of any evidence that the returns furnished in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns.

(2) If the assessing authority is not satisfied without requiring the presence of dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns.

(4) If a dealer, having furnished returns in respect of a period, fails to comply with the terms of a notice issued under sub-section (2), the Assessing Authority shall, within five years after the expiry of such period, proceed to assess to the best of his judgment and the amount of tax due from the dealer.

(5) If a dealer does not furnish returns in respect of any period by the prescribed date, the Assessing Authority shall, within five

years after the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax, if any, due from the dealer.

(7) The amount of any tax, penalty or interest payable under this Act shall be paid by the dealer in the manner prescribed by such date as may be specified in the notice issued by the assessing authority for the purpose and the date so specified shall not be less than fifteen days and not more than thirty days from the date of service of such notice: ……..

(8) If the tax assessed under this Act or any instalment thereof is not paid by any dealer within the time specified therefore in the notice of assessment or in the order permitting payment in instalments, the Commissioner or any person appointed to assist him under sub-section (1) of section (3) may after giving such dealer an opportunity of being heard, impose on him a penalty not exceeding in amount the sum due from him.

"16. The amount of any tax and penalty imposed or interest payable under this Act, which remains unpaid after the due date, shall be recoverable as arrears of land revenue."

"16-A. (1) Notwithstanding anything contained in section 16 or any law or contract to the contrary, Commissioner or any officer other than an Excise and Taxation Inspector, appointed under section 3 to assist the Commissioner, may, at any time or from time to time, by notice in writing, a copy of which shall be sent to the dealer at his last address known to the officer issuing the notice, require –

(a) any person from whom any amount is due or may become due to a dealer who has failed to comply with a notice of demand for any amount due under this Act;

(b) any person who holds or may subsequently hold any money for or on account of such dealer,

to pay into the Government treasury in the manner specified in the notice issued under this sub-section, either forthwith or upon the money becoming due or being held, or at or within the time specified in the notice (not being before the money becomes due or

it is held), so much of the money as is sufficient to pay the amount due from the dealer in respect of the arrears of the tax, interest and penalty under this Act, or the whole of the money when it is equal to or less than that amount.

……..

(6) Any amount of money which a person is required to pay under sub-section (1), or for which he is personally liable to the State Government under sub-section (4) shall, if it remains unpaid, be recoverable as an arrear of land revenue,

……..”

“16-B. Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax and penalty including interest, if any, payable by a dealer or any other person under this Act shall be a first charge on the property of the dealer or such other person.”

“36. Directors of defaulting companies to be liable to pay tax etc. – Where any tax assessed or penalty imposed under this Act on a company cannot be recovered by reason of the company having gone into liquidation or for any other reason, then every person, who was Director of such company at any time during the relevant period for which the tax is due or in respect of which the default for which the penalty is imposed was committed, shall be jointly and severally liable for the payment of such tax and penalty unless he proves that the non-payment or non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.”

(Emphasis supplied)

H.P. Land Revenue Act

“35. Making of that part of the periodical record which relates to land owners, etc. assignees of revenue and occupancy tenants. –

(1) to (4) ……..

(5) A Revenue Officer shall from time to time inquire into the correctness of all entries in the register of mutations and into all

such acquisitions as aforesaid coming to his knowledge of which, under the foregoing sub-sections, report should have been made to the patwari and entry made in that register and shall in each case make such order as he thinks fit with respect to the entry in the periodical record of the right acquired."

"36. Making of that part of the periodical record which relates to other persons. – the acquisition of any interesting land other than a right referred to in sub-section (1) of the last foregoing section shall –

(a) if it is undisputed, be recorded by the patwari in such manner as the Financial Commissioner may by rule in this behalf prescribe; and

(b) if it is disputed, be entered by the patwari in the register of mutations and dealt with in the manner prescribed in sub-sections (5) and (6) of the last foregoing section."

Reading of these provisions would show that there is a conflict between the provisions of the State and the Central statutes.

As to whether the State shall have the priority for recovery of its debt over and above the secured creditor has been considered by the Apex Court in *Dena Bank (supra),* and the relevant observations are reproduced hereinbelow:-

"8… On the very principle on which the rule is founded, the priority would be available only to such debts as are incurred by the subjects of the Crown by reference to the States sovereign power of compulsory exaction and would not extend to charges for commercial services or obligation incurred by the subjects to the State pursuant to commercial transactions. Having reviewed the available judicial pronouncements Their Lordships have summed up the law as under :-

1. There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.

3. The basic justification for the claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.

4. The doctrine may not apply in respect of debts due to the State if they are contracted by citizens in relation to commercial activities which may be undertaken by the State for achieving socio-economic good. In other word, where welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic government functions of the State and seeks to recover debts from its debtors arising out of such commercial activities the applicability of the doctrine of priority shall be open for consideration."

"10. However, the Crowns preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crowns right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. …."

The Court found that by virtue of provisions of Section 15 of the Karnataka Sales Tax Act, the State had right of recovery of its dues over and above the lender. The Court, however, was not dealing with any provision, which was in conflict with the Karnataka Sales Tax Act and was only deciding, based on the application and interpretation of Section

15 of the Karnataka Sales Tax Act, whether the State had a preferential right of recovery over the lender or not.

Dena Bank was subsequently followed in *State of M.P. vs. S.B.I., Indore,* reported in 2002(10) SCC 441, which also did not consider the conflict between the two statutory provisions.

In *Collector of Aurangabad (supra),* the Court held that the doctrine of priority of Crown debts was not given judicial recognition in the territory of Hyderabad State before its incorporation in the Indian Republic and, therefore, said doctrine could not be applied. However, in the instant case, this is not the position and, therefore, as submitted by the learned counsel for the petitioner, it would not be correct to rely upon the same to hold that debt of the State is not a Crown debt.

In *Builders Supply Corporation vs. the Union of India and others*, reported in AIR 1965 SC 1061, it has been held as under:-

> "Similarly, the basic justification for the claim for priority made by respondent No.1 in the present case rests on the well-recognised principle that the State is entitled to raise money by taxation, because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a Sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds, and this consideration emphasizes, the necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues."

The Court in *Union of India vs. Somasundram Mills (P) Ltd. and another*, reported in (1985) 2 SCC 40, has held:-

> "It is a general principle of law that debts due to the State are entitled to priority over all other debts. If a decree

> holder brings a judgment-debtor's property to sale and the sale proceeds are lying in deposit in court, the State may, even without prior attachment exercise its right to priority by making an application to the executing court for payment out. If however, the State does not choose to apply to the court for payment of its dues from the amount lying in deposit in the court but allows the amount to be taken away by some other attaching decree holder, the State cannot thereafter make an application for payment of its dues from the sale proceeds since there is no amount left with the court to be paid to the State. However, if the State had already effected an attachment of the property which was sold even before its sale, the State would be entitled from the court by filing a suit. Section 73(3) read with 73(2) CPC contemplate such a relief being granted in a suit."

To the same effect is the decision in *Lakshman Swarup Om Parkash vs. Union of India and others,* reported in (1997) 7 SCC 245.

Applying the aforesaid principles there is no doubt that the amount due under the Tax Act is a State debt.

We are not in agreement with the learned counsel for the petitioner that Full Bench of the Madras High Court in *UTI Bank (supra)* has decided that the provisions of the Act would have an overriding effect on the provisions of the Tax Act. There the Court was dealing with the provisions of the Central Excise Act and Customs Act, wherein there was no specific provisions creating first charge, unlike the provisions of Section 16-B of the Tax Act in the instant case. Therefore, this judgment does not deal with the question in issue.

The constitutional validity of the Act was challenged before the Supreme Court in *Mardia Chemicals Ltd. and others vs. Union of*

India, reported in (2004) 4 SCC 311, wherein the Court observed that the object and purpose of the Act as follows:-

> "…For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects…."
>
> "Banks and financial institutions at present face considerable difficulties in recovery of dues from the clients and enforcement of security charged to them due to the delay in the legal processes. A significant portion of the funds of banks and financial institutions is thus blocked in unproductive assets, the values of which keep deteriorating with the passage of time. Banks also incur substantial amounts of expenditure by way of legal charges which add to their overheads. The question of speeding up the process of recovery was examined in great detail by a committee set up by the Government under the Chairmanship of the late Shri Tiwari. The Tiwari Committee recommended, inter alia, the setting up of Special Tribunals which could expedite the recovery of process...."
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> "…Considering the totality of circumstances the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor it is a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy."

In *Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation and others,* reported in (2003) 2 SCC 455, the Court held:-

> "The Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and

> primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said."
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> "While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary."

Here the Court was dealing with the question as to whether the proceedings for recovery initiated by the Uttar Pradesh Financial Corporation under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 were maintainable in view of Section 34(2) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993. After observing the provisions of Section 34(2) of DRT Act containing the non-obstante clause, the Court observed that it was not open for the corporation to have proceeded for recovery of its debt under the Uttar Pradesh Act.

The aforesaid judgment has been followed in *Pawan Kumar Jain vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and others,* reported in (2004) 6 SCC 758.

Again in *State Bank of Bikaner & Jaipur (supra)*, the Court was considering the conflict between the rights of the mortgagee with that of the statutory right of first charge created by the statute under the relevant provisions of the Sales Tax Act and in this background the Court held:-

> "9. We find support for this conclusion in the observations made in Fisher and Lightwood's Law of Mortgage, 10th Edn. At page 33 where the statutory charges are discussed. In dealing with a statutory charge in favour of rating authorities in respect of rating surcharges for unused commercial buildings under the General Rate Act, 1967, it is stated that "a statutory charge has priority to the interest of the mortgagee under a mortgage existing when the

> charge arose". In the case of *Westminster City Council v. Haymarket Publishing Ltd., [(1981) 2 All ER 555],* the English Court of Appeals was required to consider whether a statutory charge on the property under the General Rate Act would have priority over a legal mortgage on the property existing when the charge came into being. It was argued that the charge would be only on the mortgagor-owner's interest in the property i.e. on the equity of redemption. The court negatived this contention. It held that "charge on the land' imposed for an unpaid surcharge was not confined to a charge on the owner's interest in the premises when the charge arose, but extended to a charge on all the estates and interests in the premises existing when the charge arose. The rating authority's charge would have priority over the bank's interest as a mortgagee."

It is pertinent to point out, however, that in the aforesaid decision, the Court was not considering the conflict of rights created by two statutes, particularly, the one which is a special and a central statute.

In *Rajasthan State Industrial Development and Investment Corporation Ltd. (RIICO), vs. State of Rajasthan and others,* reported in AIR 1995 Raj. 219, a Division has held that even if mortgaged property, on which the first charge is claimed, stands sold the proceeds of the sale can be recovered by the State by virtue of its right as a 1st charge.

In *Allahabad Bank* (supra), the Court has held that non-obstante clause, in a subsequent Legislation would prevail over the non-obstante clause in a prior legislation unless it is found that subsequent Legislation is a general statute and the earlier Legislation is a special one.

Solidaire India Ltd. (supra), followed subsequently in *Maruti Udyog Ltd. vs. Ram Lal and others*, reported in (2005) 2 SCC 638, has held that in the event of conflict between two special statutes the later would prevail.

In *Krishi Utpadan Mandi Samiti and others vs. Pilibhit Pantnagar Beej Ltd. and another,* reported in (2004) 1 SCC 391, it has been held as under:-

> "Fiscal statute must not only be construed literally, but also strictly."

> "59. The matter may be considered from another angle: "*expression unius personae vel rei est exclusion alterius"* is a well known maximum which means the express intention of one person or thing is the exclusion of another. The said maxim is applicable in the instant case. [See *Khemka & Co. (Agencies)(P) Ltd. v. State of Maharashtra, paras SCC 47 and 48 [(1975) 2 SCC 22]*."
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> "57. Although the dictionary meaning of business may be wide, in our opinion, for the purpose of considering the same in the context of regulatory and penal statute like the Act, the same must be read as carrying on a commercial venture in agricultural produce. The rule of strict construction should be applied in the instant case. ……..Furthermore, it is well known that construction of a statute will depend upon the purport and object of the Act, as has been held in *Sri Krishna Coconut case (AIR 1967 SC 973)* itself. Therefore, different provisions of the statute which have the object of enforcing the provisions thereof, namely, levy of market fee, which was to be collected for the benefit of the producers, in our opinion, is to be interpreted differently from a provision where it requires a person to obtain a licence so as to regulate a trade. It is now well known that in case of doubt in construction of a penal statute, the same should be construed in favour of the subject and against the State."
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> "58. In the case of *London and North Easter Rly. Co. v. Berriman,* {1946 AC 278 : (1946) 1 All ER 255 (HL)}, Lord Simonds quoted with approval (at All ER p 270 C.D) the following observations of Lord Esher, M.R. in the case of *Tuck & Sons v. Priester,* [(1887) 19 QBD 629 : 56 LJ QB 553{CA}], QBD at p. 638:

> "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."
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> It is trite that fiscal statute must not only be construed literally, but also strictly. It is further well known that if in terms of the provisions of a penal statute a person becomes liable to follow the provisions thereof it should be clear and unambiguous so as to let him know his legal obligations and liabilities thereunder."

In *Narendra Kumar Maheshwari vs. Union of India and others*, reported in 1990 (supp) SCC 440, it has been held as under:-

> "The legal position is that a floating charge creates a present equitable right in favour of the debenture holders/ trustees. It creates a present charge in the property/undertaking of a company even before the time of payment of the debenture arrives."

In *Indian Oil Corpn. Vs. NEPC India Ltd. and others*, reported in (2006) 6 SCC 736, it has been held as under:-

> "Where a specific existing property is hypothecated what is created is a 'fixed' charge. The floating charge refers to a charge created generally against the assets held by the debtor at any given point of time during the subsistence of the deed of hypothecation. For example where a borrower hypothecates his stock-in-trade in favour of the bank creating a floating charge, the stock-in-trade, held by the borrower as on the date of hypothecation may be sold or disposed of by the debtor without reference to the creditor. But as and when new stock-in-trade is manufactured or received, the charge attaches to such future stock-in-trade until it is disposed of. The creditor has the right at any

> given point of time to exercise his right by converting the hypothecation into a pledge by taking possession of the stock-in-trade held by the debtor at that point in time."

While construing the provisions of the relevant Acts and applying the principles of law laid down by the Apex Court referred to as above, we are of the view that keeping in view the object and the purpose of the Act, absolute right has been given to the Bank to take all measures as provided for under the provisions of Section 13 of the Act. Under Section 13(4) of the Act, the Bank has an absolute right to take possession of the secured assets of the borrower, including the right to transfer the same by way of sale which, upon transfer, by virtue of Section 13 (6), shall vest in the transferee with all rights in, or in relation to, the secured asset.

Undoubtedly, Section 16-B of the Tax Act also contains a non-obstante clause, which makes the amount of tax payable by a dealer to be a first charge on the property of the dealer. There is, thus, obviously a conflict between the provisions of the two statutes.

The powers are absolute and in view of the *non obstante clause* contained in Section 35 of the Act, would have an overriding effect over all inconsistent provisions contained in any other law. The Act being a special statute, enacted later in point in time and that too by the Central Government, in our view, would override the inconsistent provisions contained in the Tax Act. This is in the scheme of constitutional provisions also. Therefore, the Bank is well within its right to take over the property and sell the same notwithstanding the 1st charge of the State on the property of the dealer.

The issue needs to be examined from another perspective. Under the provisions of the Tax Act, the Assessing Authority is required

to assess the amount of tax due from the dealer on the basis of returns filed. If the Assessing Authority is not satisfied that the returns furnished are correct and complete or that no returns have been filed at all he shall serve a notice, give an opportunity of hearing and as the case may arise, adopt the best judgment method and assess the amount of tax due from the dealer. This is so provided under Section 14 of the Tax Act. The amount so assessed is required to be paid by the assessee within the time stipulated in the notice to be issued by the Assessing Authority, failing which the amount due is recoverable as arrears of land revenue as provided for under Section 16, which, however, in view of *non obstante clause* contained in Section 16A comes into operation only after the dealer fails to pay the amount due when a notice in writing is issued to him. Now, in the present case no notice of demand, as stipulated under Section 14(7) or Section 16A has been issued to any of the dealers. The action of respondent No.5 in asking respondents No.3 and 4 and also the action of respondent No.4 in acting upon the request of respondent No.5 to make entries (in red ink) of arrears of tax due recoverable as land revenue in the revenue record is thus bad in law. For the very same reason, the action of the respondent in not mutating the name of the petitioner, in spite of No Objection issued by the State for getting the sale deed executed is thus in gross violation of the provisions of the Tax Act.

Further the right of the respondent-State to have a first charge on the property of the dealer can be only if there is proper adjudication and determination of the amount due under the Tax Act and in the absence thereof, it cannot be said that the tax is due and payable by the dealer. Till such time, the same is done, there cannot be any crystalisation of charge. The charge of the State is not a floating charge.

In the instant case the Bank had already exercised its right and taken possession of the property much prior to the assessment order dated 18.1.2005 passed by the Assessing Authority. In fact before the said date the property itself had been advertised to be sold by public auction. No notice of demand was ever issued under Sections 14 and 16-A before action under Section 16 of the Tax Act was taken. Assuming that the first charge stood created prior to the passing of the order of assessment, in our view the provisions of Section 35 of the Act would override the inconsistent provisions of Section 16-B of the Tax Act leading to the only conclusion and that there is no prior charge on the property except for that of the Bank with whom the property was mortgaged. Thus, in our view, looking from all angles the action of the State cannot be upheld.

The creation of 1st charge or status of encumbrance of property was recorded for the 1st time on 11.7.2006. The record of rights, i.e. revenue record did not reflect any status of encumbrance of the property or creation of 1st charge in spite of the fact that the respondents were duly informed about the auction and issuance of the sale certificate by the Bank in favour of the petitioner. It was only when the State was satisfied about the non encumbrance that the permission to transfer the property in the name of the petitioner was accorded. In fact, based on the revenue record the Bank considered the property to be unencumbered and accepted the same as a security. It took over the same and put it to auction as a secured asset which stands purchased by the petitioner as such.

In the present case, the mortgage was duly created and the mortgage debt was disbursed in favour of borrower company prior to the creation of any charge. Any subsequent claim or charge, in view of non-obstante clause contained in Section 35, would not impair, prejudice or

curtail the priority of mortgagee unless the mortgage itself is successfully assailed on the ground of some legal infirmity which in any case is not the case of the respondent-State.

The order of assessment was passed on 18.1.2005 and prior to the said date the property was not encumbered. The petitioner proceeded to participate in auction knowing fully well that the sale is pursuant to the power exercised by the Bank under the Act and the auctioned property shall vest in the auction purchaser completely and absolutely free from all encumbrances. In these circumstances, the petitioner's participation and purchase of the property is bonafide and it cannot be said that the petitioner is successor of the borrower company, who alongwith its Directors is liable to pay the tax liability.

There is no provision under the Act which would fasten the liability of the predecessor-in-interest on the auction purchaser. In fact Rule 9 framed under Section 38 of the Act stipulates that the secured creditor on deposit of money shall issue a certificate of sale specifically mentioning that the property purchased is free from encumbrances known to the secured creditor. In the present case the terms of the sale certificate, as referred to above, would show that sale of the property was made free from all encumbrances known to the secured creditor. The secured creditor had taken all steps and due precautions in informing the authorities about the actions taken by them. It had not only taken the possession of the property but put the same to sale by way of public auction and informed the authorities of having sold the same to petitioner and requesting them for effecting the entries in the revenue record. Apparently, the respondents-authorities have been sleeping over the matter and not taken any action in determining the amount or raising the demand. That the functionaries of the State did not act on the letters

dated 8.7.2004 or 18.5.2006 would not matter. These letters have not been placed on record and the contents thereof are not known, therefore, the earliest that the State can be said to exercise its right under the Act is on 11.7.2006.

It is important to point out that State is not rendered remediless. In exercise of its power under Section 36 of the Tax Act, the State can initiate action for recovery of amount against every person, who has been the Director of the Company and is, statutorily, jointly and severally liable for payment for the amount of tax which is due. Subject to the right of the Bank to recover the loan amount, in law, the State can still exercise its right under Section 13(7) of the Act to claim the residue of the money received by the Bank.

The exercise of power by the respondent-State and its functionaries in our view is totally arbitrary and without any legal or equitable right and is in fact a colourable exercise and an abuse of power and authority vested in them.

In our view, the liability of the borrower and its Directors cannot be fastened upon the petitioner, particularly, when the State had, after ascertaining the factual position from its various field agencies accorded permission to transfer the land in favour of the petitioner. If the revenue record did not reflect the factum of the State's liability then it was not expected for the petitioner to make an inquiry from all the concerned departments of which the petitioner even may not knowing in relation to its debts.

The effect of accepting the State's submission to the contrary, would only promote and strengthen dishonest persons, who would be transferring their units from one hand to another from time to time without making the payment of dues. Further, there is nothing on

record to show the tax liability pertaining to M/s Regent Rubber. The petitioner had purchased the property to set up an industry which has been delayed for no fault on his part.

For all the aforesaid reasons, the writ petition is allowed. Order rejecting petitioner's application for not mutating the entry in their name is quashed and set aside. The respondents No. 1 to 5 are directed to delete the adverse entry showing the sales tax dues of M/s Regent Rubber and M/s Eastman Rubber in relation to the property comprising in Khasra No. 254/2/1, Khatauni Nos. 7min, 14 min, measuring 3 Bighas 7 Biswas, situated at Village Moginand, Kala-Amb, Tehsil Nahan, District Sirmaur, H.P. and further respondent No.3 is directed to mutate the property in the name of petitioner company. The petitioner shall be entitled to costs, which is quantified at Rs.25,000/-, from respondents No.1 to 5.

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In view of the disposal of the main writ petition, both the applications are also disposed of.

(V.K.Gupta),
Chief Justice

(Sanjay Karol),
Judge

7th September, 2007
(C)